92-1677

Supreme Court, U.S.
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In The
Supreme Court Of The United States

OCTOBER, 1992

TERM

BEN JONES, JOHN ISAAC, HARVEY ECHOLS, JIM THORNTON, SHERMAN JONES, and HENRY WASHINGTON,

Petitioners,

v.

FIRESTONE TIRE AND RUBBER COMPANY, INC.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ROBERT L. WIGGINS, JR.
(Counsel of Record)
1400 SouthTrust Tower
Birmingham, Alabama 35203
(205) 328-0640

Robert F. Childs, Jr.
Ann K. Norton
1400 SouthTrust Tower
Birmingham, Alabama 35203
(205) 328-0640
Counsel for Petitioners

QUESTIONS PRESENTED FOR REVIEW

1. May the district court require proof of the merits of the named plaintiff's individual claim of employment discrimination in order to establish constitutional standing to represent a class having the same type of claim?

2. In deciding questions of constitutional standing to prosecute claims on behalf of a class, is it enough to present sufficient proof to defeat summary judgment and require a trial on the merits, or may the district court "weigh the conflicting evidence" and make credibility determinations as to whether the named plaintiff can ultimately prevail on his claims at trial?

LIST OF PARTIES

The parties to this case in the Court of Appeals were as follows:

Ben Jones, John Isaac, Harvey Echols, Jim Thornton, Sherman Jones, and Henry Washington, Petitioners;

Firestone Tire and Rubber Company, Respondent;

C. Daniel Karnes, John R. Spitzig, Burke, Bosselman & Weaver, 55 West Monroe Street, Suite 800, Chicago, Illinois 60603, Counsel for Respondent;

Peyton Lacy, Jr., Lange, Simpson, Robinson & Somerville, 1700 First Alabama Bank Building, Birmingham, Alabama 35203, Counsel for Respondent;

Robert L. Wiggins, Jr., Gordon, Silberman, Wiggins and Childs, 1400 SouthTrust Tower, Birmingham, Alabama 35203, Counsel for Petitioners;

Robert F. Childs, Jr., and Ann K. Norton, Gordon, Silberman, Wiggins and Childs, 1400 SouthTrust Tower, Birmingham, Alabama 35203, Counsel for Petitioners.

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OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reproduced in Appendix A. The opinion of the district court concerning class certification is reproduced at Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

STATUTES INVOLVED

The "case or controversy" clause of of Article III of the United States Constitution.

STATEMENT OF THE CASE

1. Proceedings In The District Court

A class action was filed in Birmingham, Alabama on February 1, 1988 alleging that Firestone racially segregated the employees in its retail stores according to the race of the neighborhood where the store was located and that racial discrimination infected the promotion process in such stores. Firestone's retail stores were organized into geographical clusters

known as "Markets". The named plaintiffs alleged racial discrimination in promotion opportunities against themselves individually and against the putative class in both the Birmingham Market and the other geographical Markets in the Southeastern United States. The putative class representatives were the original named plaintiff, Ben Jones, and five named intervenors (John Isaacs, Harvey Echols, Henry Washington, Sherman Jones and Jim Thornton). R1-35, 38, 63 and 65.

After an evidentiary hearing on class certification, the district court denied certification of a class. R1-77. The ruling was based on the mistaken belief that the named plaintiffs could not prove a promotional vacancy beyond the Birmingham Market as a part of the merits of their individual claim of promotional discrimination and for that reason could not represent a class beyond Birmingham. R1-77, pp. 5-7. The district court held that a class within the Birmingham Market was not sufficiently numerous to satisfy F. R. Civ. P. 23 (a) (1), even though the named plaintiffs satisfied the other requirements for certification of such a class. Id..

After denial of class certification, the individual claims of the named plaintiffs for promotion discrimination beyond the Birmingham Market continued to be prosecuted until the district court eventually granted summary judgment on the same mistaken belief that no vacancy occurred beyond Birmingham which the named plaintiffs could have filled. On appeal, the Eleventh Circuit reversed the summary judgment against the named plaintiff's individual claim of promotion discrimination beyond the Birmingham Market. App. 21. The Court held that there was sufficient evidence of the merit of the named plaintiff's individual claim of discriminatory denial of promotion to a

vacancy filled by Terry Dahlem in the Atlanta Market to require a trial of such claim on remand. App. 21.

On the very same issue in the class certification context, however, the Court of Appeals held that the named plaintiff's individual claim to the Dahlem vacancy or other positions beyond the Birmingham Market were without merit and that he therefore lacked "constitutional standing"[1] to represent a class of promotion discriminatees beyond the Birmingham Market. Both in the context of class certification and summary judgment the Courts below looked at Ben Jones' qualifications to fill the vacancy awarded to Terry Dahlem in the Atlanta Market on the basis of the identical evidentiary record. In the context of "standing" to represent a class, the Court of Appeals held that Jones was not "qualified" to fill the Dahlem vacancy because

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[1] The Court of Appeals stated that "the threshold question is whether the named plaintiffs have standing, in the constitutional sense, to raise certain issues" and that "'[o]nly after the court determines the issues for which the named plaintiffs have standing should it address the question whether the named plaintiffs have representative capacity, as defined by Rule 23 (a), to assert the rights of others'". App. 7. [quoting from *Griffin v. Dugger*, 823 F.2d 1476, 1482 (11th Cir. 1987)]. The Court then held that because the original plaintiff did not establish the merits of his individual claim of discriminatory denial of promotions outside the Birmingham Market, he "only had standing to pursue claims regarding promotions, transfers and demotions relating to store manager positions within the Birmingham Market". App. 13. The Eleventh Circuit's ruling that the named plaintiff lacks "standing in a constitutional sense" because his individual claim appears to lack merit creates a conflict with other Circuits and this Court on an issue of fundamental importance.

not make such transfers, but in the context of summary judgment the Court held that Jones was qualified for such vacancy and that Firestone did indeed allow such inter-Zone transfers for white employees.

The Eleventh Circuit justified the diametrically opposite results it reached on the basis of a differing standard of review on the issue of "standing" as compared to summary judgment on the merits. The Court held that the lower courts can "weigh the conflicting evidence" at the class certification hearing in deciding whether the named plaintiff has "constitutional standing" to pursue his individual claim and, as a result, standing to represent a class having the same type of claims. In the context of summary judgment on the merits of his claim, however, no weighing of the evidence is permitted and, thus, a named plaintiff can lack "standing in a constitutional sense" to present a claim even though that claim has sufficient merit to defeat summary judgment and to be remanded for trial on the merits. In the Eleventh Circuit's own words:

> The court, in the exercise of its broad discretion regarding certification of a class, was entitled to weigh the conflicting evidence regarding inter-Zone transfers and conclude that Jones was not eligible for the Dahlem vacancy. Nevertheless, the standard is very different for our review of summary judgment. The plaintiff's evidence, and the justifiable inferences from it, present a genuine issue of material fact which precluded summary judgment.

App. 22 n.10 The Court of Appeals gave no explanation for how a plaintiff could lack "constitutional standing" for a claim that was simultaneously remanded for trial on the merits. Compare App. 12-13 with 21.

Similarly, in regard to the § 1981 claim in the context of summary judgment, the Court of Appeals held:

> Jones' promotion claim may also be cognizable under § 1981. Again, the district court does not appear to have considered whether the Dahlem vacancy offered 'an opportunity for a new and distinct relation between the employee and the employer'. *Patterson*, 491 U.S. at 185-86, 109 S.Ct. at 2377. The record at summary judgment, construed in the light most favorable to the nonmovants, suggests that this is a genuine issue of material fact.

App. 22. But on the same issue in the class certification stage of the Opinion, the panel held the opposite:

> Under the test suggested by the Supreme Court in *Patterson*, then, the district court could have found that the promotions which Jones was denied did not rise 'to the level of an opportunity for a new and distinct relation between the employee and the employer'. The court concluded that Jones did not have a cognizable claim under Section 1981 as interpreted by *Patterson* and was not able to serve as a class representative for the putative Section 1981 class. This was not an abuse of discretion, and so we affirm the district court's refusal to certify a Section 1981 class.

App. 18.

The courts below never addressed the status of the five intervenors as class representatives. They independently appealed that issue in Appeal No. 7499. Neither the district court or the Court of Appeals ever rejected the five intervenors as class representatives on commonality, typicality or adequacy grounds. Nor did the district court or the Court of Appeals reject the intervenors' standing or class representative capacity for lack of merit of their individual claims. Those claims have now been remanded for trial on the merits. The refusal of the Eleventh Circuit to separately consider the intervenors as class representatives or to remand for the trial court to consider their representation of the class also creates error of exceptional importance.

REASONS FOR GRANTING THE WRIT

I.

A Conflict Was Created By Directing The District Courts Of The Eleventh Circuit To "Weigh Conflicting Evidence" On The Merits Of the Plaintiff's Individual Claim To Decide Whether He Has Standing To Pursue Such Claim On Behalf Of Himself And A Class

The Eleventh Circuit created a conflict with other Circuits and this Court by holding that district courts may "weigh the evidence" on the merits of the plaintiff's individual claim in deciding whether he has "constitutional standing" to pursue such

claim on behalf of himself and a class having the same type of claim. App. 22 n.10. This Court has long held that "standing in no way depends on the merits of the plaintiffs' contention that particular conduct is illegal" and that in deciding question of standing "both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party". *Warth v. Seldin*, 422 U.S. 490, 500, 501 (1975). Although a district court can "require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing", it is still not permitted to "weigh the conflicting evidence" on the merits of such contentions but must instead "accept as true all material allegations ... and must construe [the allegations] in favor of the complaining party". *Id.*

The Eleventh Circuit's ruling upsets a long line of carefully crafted precedent on the role of standing in representation of a class and creates error of exceptional public importance. *Warth* is but one of a long line of cases decided by this Court requiring that the standing determination be made from an analysis of the allegations in the complaint based on the presumption that those allegations are true and construing them in favor of the plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421-422 (1989); *Bell v. Hood*, 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946)[2]; *O'Shea v. Littleton*, 414 U.S. 488, 493-494, 94 S.Ct.

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[2] Citing *Swafford v. Templeton*, 185 U.S. 487, 493-494, 22 S.Ct. 783, 785-786, 46 L.Ed. 1005 (1902) and *Binderup v. Pathe Exchange*, 263 U.S. 291, 305-308, 44 S.Ct. 96, 98-99, 68 L.Ed. 308 (1923), this Court stated in *Bell v. Hood, supra*:

674-675, 38 L.Ed.2d 674 (1974); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *Valley Forge Christian College v. Americans United For Separation Of Church And State, Inc.*, 454 U.S. 464 (1982).

The other Courts of Appeals have unanimously restricted the scope of the inquiry into standing to the allegations of the complaint and disallowed a weighing of the evidence of the merits of the complaint. *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1043, 1045 (5th Cir. 1981) (In the context of determining constitutional standing to represent a class, "We emphasize that the merits of the plaintiff's case are not now at issue and, in fact, could not be reached at this stage of the litigation."). *Abraham v. Volkswagen of America, Inc.*, 795 F.2d 238, 243, 246 (2nd Cir. 1986); *N.A.A.C.P., Boston Chapter v. Harris*, 607 F.2d 514 (1st Cir. 1979); *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252 (2nd Cir. 1989) ("A litigant need not have a winning claim to have standing".); *Frizzel v. Rizzo*, 597 F.2d 840 (3rd Cir. 1979); *Motor Coach*

"Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well stated that the failure to state a proper cause of action calls for a judgment on the merits and not for dismissal for want of jurisdiction. Whether a complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal would be on the merits, not for want of jurisdiction." (327 U. S. at 682)

Industries, Inc. v. Dole, 725 F.2d 958 (4th Cir. 1984); *Harmsen v. Smith*, 693 F.2d 932 (9th Cir. 1982).

From all of these cases, it is clear that the standard of review for adjudicating standing does not differ from the standard for adjudicating any other motion to dismiss under F. R. Civ. P. 12 (b) (6) or summary judgment under Rule 56. In none of these contexts, including standing, can the district court "weigh the conflicting evidence", but must instead construe the pleadings or evidence in the light most favorable to the plaintiff. The Eleventh Circuit creates a conflict with this entire body of precedent from other Circuits and this Court by holding that the trial courts may "weigh the conflicting evidence" on the merits of the individual claim in deciding "standing" to represent a class at the class certification stage of the case. Unless corrected, the class certification inquiry in the Eleventh Circuit will be misdirected away from the true issues embodied in Rule 23 (a) and toward the litigation of the merits of the named plaintiff's individual claims.[3]

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[3] This is the opposite direction in the law regarding class certification from that indicated by this Court in its last major look at such issues in *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 159 (1982). There, the court held that the purpose of the class action device is to "advance the efficiency and economy of litigation" by trying the named plaintiff's individual claim at the same time as the class claims of the same type. Id. at 159 (Class certification inappropriate where "the individual and class claims might as well have been tried separately. It is clear that the maintenance of respondent's action as a class action did 'not advance the efficiency and economy of litigation which is a principal purpose of the procedure".). The Eleventh Circuit's approach to "standing" fails to achieve these purposes because it requires trial of the

The ruling of the Eleventh Circuit raises serious questions about the utility and functioning of the class action device by holding, for the first time in any Circuit, that the defendant may attack the merits of the class representative's individual claim at the class certification stage of the case in an effort to establish that he lacks "constitutional standing" to represent the class because his individual claim was not predictably a winning one. By permitting the defendant to challenge, and the district court to determine, the merits of the class representative's individual claim at the class certification stage of the case, the Eleventh Circuit has greatly complicated class certification proceedings which are commanded by Rule 23 to be held "as soon as practicable after the commencement of an action". See F. R. Civ. P. 23. Parties must now be prepared to present and rebut conflicting evidence on the merits of the class representative's individual claim at the class certification stage of the case in order to determine whether there is "standing in a constitutional sense" to represent the class. *See e.g., Abraham v. Volkswagen,* 795 F.2d 238, 246 (2nd Cir. 1986) ("Considerations of judicial efficiency weigh against rules that require extensive discovery, evidence and analysis going to the merits of individual claims solely to determine subject matter jurisdiction. *** We thus hold that ... the limited inquiry normally pursued in class action cases is appropriate".).

Even plaintiffs who demonstrate sufficient merit in their individual claims to defeat summary judgment and require a trial

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plaintiff's individual claim at the class certification hearing, but then requires a second trial of the same issues on the merits after denial of class certification.

on the merits can be held to lack "constitutional standing" if the district court determines by "weighing the conflicting evidence" that he might lose on the merits of his individual claim at trial. That is what occurred with the current plaintiffs. They were held to have demonstrated sufficient merit in their individual claims to reverse summary judgment and to require a trial on the merits of such claims on remand, but for class certification it was held that they lacked standing to represent a class having the same claims after "weighing the conflicting evidence" on the merits of their individual claims. Compare App. 12-13 with App. 21.

The Eleventh Circuit is also in direct conflict with other decisions of this Court and the other circuits. This Court has held for many years that at the class certification stage the district court may not assess the likelihood of the plaintiff's success on the merits of his individual claim. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-178 (1974) (The district court does not possess "any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.").

All of the Courts of Appeals have also held that a district court does not possess authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. *Wagner v. Taylor*, 836 F.2d 578 (D. C. Cir. 1987); *Sirota v. Solitran Devices, Inc.*, 673 F.2d 566, 571 (2nd Cir. 1982); *Doctor v. Seaboard Coastline Railroad Co.*, 540 F.2d 699, 707 (4th Cir. 1976); *Huff v. N. D. Cass Co. of Alabama*, 485 F.2d 710, 712 (5th Cir. 1973 (*en banc*); *Koch v. Standard*, 962 F.2d 605, 607 (7th Cir. 1992); *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975).

Lastly, the Eleventh Circuit's holding conflicts with a body of jurisprudence developed by this Court and other Circuits which have consistently held that a plaintiff can establish standing for class certification purposes independent of his standing to pursue his own individual claim and even after his individual claim has been found to lack any merit at trial or otherwise expired prior to class certification. *Gerstein v. Pugh*, 420 U.S. 103, 110, n. 10; *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980) and *Deposit Guaranty v. Roper*, 445 U.S. 326, 333-334, 340 (1980).[4] In *U. S. Parole Commission v. Geraghty*, 445 U.S. 403-44 (1980), this Court held that a named plaintiff can have constitutional standing to represent a class "notwithstanding the fact that the named plaintiff's claim on the merits has expired". The holding of *Geraghty* on the standing requirement in the context of representation of a class remains the law as follows:

> 1. The "personal stake" requirement for purposes of constitutional standing is not controlled by the named plaintiff's stake in litigating his individual claim, but rather by his stake in litigating the class claim which is a distinctly different issue. *Id.*, 445 U.S. at 402-403. ("A plaintiff who brings a class action presents two separate issues for judicial resolution. One is the claim on the merits; the other is the

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[4] *See also*, the following cases which were vacated and remanded by this Court on the basis of its decisions in *Geraghty* and *Roper*: *Satterwhite v. City of Greenville*, 578 F.2d 987 (5th Cir. 1978) (*en banc*), *vacated and remanded*, 445 U. S. 940 (1980), *remanded to district court*, 634 F.2d 231 (1981); *Armour v. City of Anniston*, 597 F.2d 46 (5th Cir. 1980), *remanded*, 622 F.2d 1226 (5th Cir. 1980), *after remand*, 654 F.2d 382 (5th Cir. 1981).

claim that he is entitled to represent a class. *** We think that in determining whether the plaintiff may continue to press the class certification claim, after the claim on the merits 'expires', we must look to the nature of the 'personal stake' in the class certification claim".).

2. "In order to achieve the primary benefits of class suits, the Federal Rules of Civil Procedure give the proposed class representative the right to have a class certified if the requirements of the Rules are met. This 'right' is more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the 'personal stake requirement'. *Id.*, 445 U.S. at 403, 100 S.Ct. at 1212.

3. All that is required for standing to represent a class is a "concrete factual setting and self-interested parties vigorously advocating opposing positions" and "these elements can exist with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired". *Id.*, 445 U.S. at 403. This is because "vigorous advocacy can be assured through means other than the traditional requirement of a 'personal stake in the outcome'". *Id.*, 445 U.S. at 404.

4. "We therefore hold that an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim even though class certification has been denied. The proposed representative retains a 'personal stake' in obtaining class certification sufficient to assure that Article III values are not undermined"[5]. *Id.*, 445 U.S. at 404.

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[5] In terms of determining whether a putative class representative meets the Article III requirements to represent the class, then, there

In *Deposit Guaranty v. Roper, supra,* this Court rested standing on the putative class representative's bare assertion of an economic interest in shifting some of the costs of litigation to the other class members.[6]

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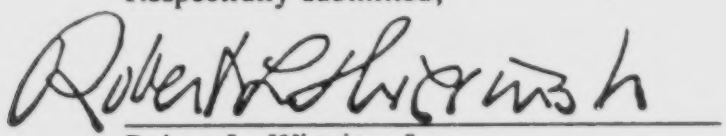
places where, as pointed out by this Court in A*llen v. Wright*, 468 U. S. 737, 750-751, 104 S. Ct. 3315, 3324, 82 L. Ed. 2d 556 (1984), the doctrines of "standing" and "mootness" overlap. The "overlap" is not whether the named plaintiff has a "live" individual claim identical to every claim asserted on behalf of the class as the Court of Appeals held, but rather whether the named plaintiff is a self interested party vigorously advocating positions opposed by the defendant(s) in a concrete factual setting. *See also, Duke Power Company v. Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 72, 98 S. Ct. 2620, 2630, 57 L. Ed. 2d 595 (1978) ("The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have 'alleged such a personal stake in the outcome of the controversy as to assure the concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional issues.'").

[6] This Court explained in *Roper* that there were four "distinct interests to be considered when deciding questions touching the justiciability issue in the class action context: (1) the interest of the named plaintiffs in the substantive controversy and their related "right as litigants in a federal court to employ in appropriate circumstances the procedural device of a Rule 23 class action to pursue their claims."; (2) distinct from their private interests, the responsibility of the named plaintiffs to represent the collective interests of the putative class; (3) the rights of putative class members as potential intervenors; (4) the integrity of the judicial process.

These opinions have been consistently interpreted by the Courts of Appeal, to prohibit consideration of the merits of the claims of putative class representatives at the class certification stage. Relying on *Geraghty* and *Roper*, the Fifth Circuit has held that in deciding a plaintiff's standing to be a class representative, "[w]hether the named plaintiff will actually prevail on the merits is of course irrelevant." *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1043-45 (5th Cir. 1981). This interpretation of *Geraghty* and *Roper* is in accord with that in the Third Circuit, *Wilkerson v. Bowen*, 828 F.2d 117 (3rd Cir. 1987) and *Hassine v. Jeffes*, 846 F.2d 169 (3rd Cir. 1988), and in the Seventh Circuit, *Tidwell v. Schweiker*, 677 F.2d 560 (7th Cir. 1982).

What is clear from this entire line of cases is that standing to represent a class does not depend upon whether the named plaintiff can prove the merits of his individual claim. The Eleventh Circuit in the current case has established principles of standing which are dependent exclusively upon proof of the merits of the named plaintiff's individual claim. By doing so it has created a substantial conflict with the precedent of this Court and the other Circuits on a question of exceptional public importance.

Respectfully submitted,



Robert L. Wiggins, Jr.

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members as potential intervenors; (4) the integrity of the judicial process. (445 U. S. at 331, 100 S. Ct. at 1170)

Robert F. Childs, Jr.
Ann K. Norton
Counsel for Petitioners,
Ben Jones, John Isaac, Harvey Echols,
Jim Thornton, Sherman Jones and
Henry Washington

OF COUNSEL:
GORDON, SILBERMAN, WIGGINS & CHILDS, P.C.
1400 SouthTrust Tower
Birmingham, Alabama 35203
(205) 328-0640

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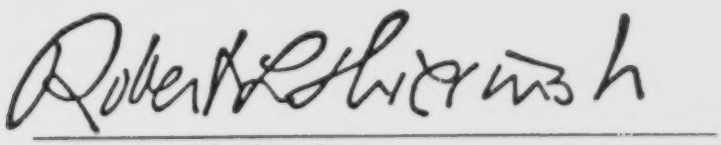
I do hereby certify that I have mailed a copy of the above and foregoing, by U.S. Mail, properly addressed and postage prepaid on C. Daniel Karnes, John R. Spitzig, Burke, Bosselman & Weaver, 55 West Monroe Street, Suite 800, Chicago, Illinois 60603, and Peyton Lacy, Jr., Lange, Simpson, Robinson & Somerville, 1700 First Alabama Bank Building, Birmingham, Alabama 35203.

This the 15th day of April, 1993.



Robert L. Wiggins, Jr.

APPENDIX A

Ben JONES, Plaintiff,

John Issac; Harvey Echols; Jim Thornton; Sherman Jones; Henry Washington, Plaintiffs-Intervenors, Appellants,

v.

FIRESTONE TIRE AND RUBBER COMPANY, INC., Defendant-Appellee.

Ben JONES, Plaintiff-Appellant,

John Issac; Harvey Echols; Jim Thornton; Sherman Jones; Henry Washington, Plaintiff-Intervenors,

v.

FIRESTONE TIRE AND RUBBER COMPANY, INC., Defendant Appellee.

Nos. 90-7499, 90-7755.

United States Court of Appeals,
Eleventh Circuit.

Oct. 27, 1992.

Appeal from the United States District Court for the Northern District of Alabama.

Before TJOFLAT, Chief Judge, BIRCH, Circuit Judge, and HILL, Senior Circuit Judge.

TJOFLAT, Chief Judge:

This case consolidates the appeals of Ben Jones (Jones) (No. 90-7755) and John Issac, Harvey Echols, Jim Thornton, Sherman Jones, and Henry Washington (Intervenors) (No. 90-7499) from discovery, class certification, and summary judgment orders, and from trial verdicts in favor of defendant Firestone Tire & Rubber Co. (Firestone). This case is among the diminishing number of employment discrimination cases that must be decided under the rulings of the Supreme Court prior to the Civil Rights Act of 1991.

We affirm in part, reverse in part, and remand for further proceedings.

I.

Firestone is organized into various regions across the country. The Southeast Region encompasses eight states and is subdivided into five "zones": the Metro Market Zone, the Non-Metro Market Zone, and the three Major Metro Market Zones of Atlanta, Miami, and Tampa-Orlando. The Metro Market and Non-Metro Market Zones are further subdivided into five and eight markets respectively. Each of these markets comprises a

group of stores in a particular geographical region. Each store employs a store manager, one or more assistant store managers, service managers, and retail salespersons ("pivotal employees"); and several technicians, installers and general service persons ("non-pivotal employees").

The Southeast Region is headed by a Regional Director. Each Zone is headed by a Zone Manager. Each Market is headed by a Store Supervisor (in the Major Metro Market Zones) or a Market Manager (in the Metro and Non-Metro Market Zones). The Store Supervisors and Market Managers are assisted by Sales Administrators in each market.

Ben Jones was employed by Firestone from 1968 to 1986. In 1971, he became the first black Store Manager employed by Firestone in the Birmingham Market in the Metro Market Zone. He served in this position until 1983, when he was demoted to Assistant Store Manager. He was promoted to the position of Store Manager at Firestone's downtown Birmingham store in June 1984.

Chip Franklin became Market Manager of the Birmingham Market, and thus Jones' direct supervisor, in March 1985. In February 1986, Franklin instituted a policy that Store Managers were to remain in their stores during all business hours unless they had received Franklin's permission to leave. On Friday, August 15, 1986, Jones left his store for a dental appointment without Franklin's permission. He was also absent from the store on Saturday. The parties presented conflicting evidence about the measures which Jones took to notify Franklin of his dental appointment and continued absence.

On Monday, August 18, 1986, Franklin called Jones to his office to reprimand him for this incident. Franklin removed Jones from his position as Store Manager and offered him a choice between termination and a position as an Assistant Manager. On Tuesday, August 19, 1986, Franklin informed Jones that he had been unsuccessful in finding a Store Manager who wanted Jones as an assistant. Franklin offered him a position as a "floating" Assistant Manager. Jones accepted termination on August 20, 1986, rather than acquiesce to the demotion.

On October 12, 1986, Jones filed an EEOC charge in which he asserted (i) that his threatened demotion was based on his race and was in retaliation for an earlier EEOC charge he had filed, (ii) that Firestone had a practice of assigning managers to stores based on "the racial composition of a particular store's clientele," and (iii) that Firestone discriminated on the basis of race with regard to "job assignments, promotions, discipline, discharges, and other terms and conditions of employment." Jones asked the EEOC for a right-to-sue letter and received one in August 1987.

On February 1, 1988, Jones filed a complaint under 42 U.S.C. §§ 2000e to 2000e-17 (1988) (Title VII), and 42 U.S.C. § 1981 (1988), based on these charges. He sued individually and on behalf of a class of "black persons who applied for employment, have been employed, or who may in the future be employed and who [suffered discrimination] because of their race in discipline, discharge, job assignments, promotions, demotion, and other terms and conditions of employment." He sought (i) a declaratory judgment that Firestone's employment procedures

were in violation of Title VII, (ii) a permanent injunction against continuing violations, and (iii) reinstatement, back pay, damages, lost seniority, and lost pension and fringe benefit credits.[1]

Five members of the proposed class--John Issac, Harvey Echols, Jim Thornton, Sherman Jones, and Henry Washington--were later permitted to intervene to assert claims on behalf of themselves and the class. None of the Intervenors had filed EEOC charges.

On November 28, 1989, the district court denied class certification for the putative class alleging racial discrimination in promotions.[2] In June 1990, the district court granted summary judgment for Firestone with regard to all claims of the Intervenors and, pursuant to Fed.R.Civ.P. 54(b), entered final judgments against them. The Intervenors appeal in No. 90-7499.

The district court also granted summary judgment for Firestone with regard to the claims of Jones "concerning discriminatory failure to promote, discrimination in job assignment, and constructive discharge." The court declined to

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[1] "Title VII does not allow awards for compensatory or punitive damages; instead it limits available remedies to backpay, injunctions, and other equitable relief." *United States v. Burke*, __ U.S. __, __, 112 S.Ct. 1867, 1873, 119 L.Ed.2d 34 (1992).

[2] Although originally assigned to Chief Judge Sam C. Pointer, Jr., the case was reassigned to Judge Edwin L. Nelson after the denial of class certification.

enter final judgment on these claims pursuant to Rule 54(b). Jones proceeded to trial on his remaining claims: demotion and retaliation. On September 24, 1990, the judge conducted a bench trial and ruled in favor of Firestone on both claims. Jones appeals in No. 90-7755.

Three groups of issues are before this court. Part II discusses the issues involved in the district court's decision not to certify a class. Part III examines the summary judgments granted to the defendant. Part IV addresses the trial verdicts rendered. We affirm the denial of class certification and the trial verdicts. We reverse the summary judgments as to the promotion claims of Jones and the Intervenors, but affirm all other summary judgments. We remand for further proceedings concerning the promotion claims.

II.

[1] A district court's denial of class certification will not be disturbed absent an abuse of discretion. *See Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566, 1569 (11th Cir. 1992); *Coon v. Georgia Pacific Corp.*, 829 F.2d 1563, 1566 (11th Cir. 1987); *Gilchrist v. Bolger*, 733 F.2d 1551, 1555 (11th Cir.1984).

[2] A plaintiff who seeks to represent a class must meet the requirements of both Fed.R.Civ.P. 23 and the underlying substantive law. At the time of the class certification hearing, Jones sought to represent a class of black Firestone employees

who had suffered racial discrimination with respect to promotions. As we have note before,

> any analysis of class certification must begin with the issue of standing and the procedural requirements of Title VII. Thus, the threshold question is whether the named plaintiffs have individual standing, in the constitutional sense, to raise certain issues. Only after the court determines the issues for which the named plaintiffs have standing should it address the question whether the named plaintiffs have representative capacity, as defined by Rule 23(a), to assert the rights of others.

Griffin v. Dugger, 823 F.2d 1476, 142 (11th Cir.1987) (citations omitted), *cert. denied*, 486 U.S. 1005, 108 S.Ct. 1729, 100 L.Ed.2d 193 (1988); *see Brown v. Sibley*, 650 F.2d 760, 771 (5th Cir. Unit A July 1981) ("This constitutional threshold must be met before any consideration of the typicality of claims or commonality of issues required for procedural reasons by Fed.R.Civ.P. 23.").[3] Here Jones seeks to represent a class based on his Title VII and section 1981 claims. He may do so only to the extent that he has standing to bring individual claims.

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[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

A.

[3-5] One who seeks to represent a class in a private Title VII suit must have standing to raise the claims of the class and must satisfy the procedural requirements of Title VII. *Griffin*, 823 F.2d at 1482. Title VII requires a plaintiff to file a charge with the EEOC within 180 days of the alleged unfair labor practice.[4] Pursuant to the "single-filing rule," "[a]s long as at least one named plaintiff timely filed an EEOC charge, the precondition to a Title VII action is met for all other named plaintiffs and class members." *Griffin*, 823 F.2d at 1492. This rule encompasses two essential requirements: "First, at least one plaintiff must have timely filed an EEOC complaint that is not otherwise defective.... Second, the individual claims of the filing and non-filing plaintiffs must have arisen out of similar discriminatory treatment in the same time frame" *Jackson v. Seaboard Coast Line R.R.*, 678 F.2d 992, 1011-12 (11th Cir.1982); *see also Griffin*, 823 F.2d at 1492-93.

Only Ben Jones filed an EEOC complaint. Therefore, the first issue is the effective scope of his EEOC charge. The class may pursue only those claims arising "out of similar discriminatory

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[4] 42 U.S.C. § 2000-e-5 (e) (1988). This period may be extended to no more than 300 days if the aggrieved person first institutes "proceedings with a State or local agency with authority to grant or seek relief from such practice or institute criminal proceedings with respect thereto." *Id.*

treatment in the same time frame." Jones filed his EEOC charge on October 12, 1986. The charge alleged that Firestone discriminated on the basis of race with regard to "job assignments, promotions, discipline, discharges, and other terms and conditions of employment."

The district court determined that Jones' charge provided a basis for claims arising between April 15, 1986 (180 days before the charge was filed and August 20, 1986 (the date Jones left Firestone). The court found that Jones only had standing to complain about "his demotion" and "his failure to be selected by [the Market Manager] for a transfer to any of the several Store Manager positions that were filled during the period and which may have provided an opportunity for increased earnings, albeit at the same level." No. CV 88-P-0170-S, slip op. at 5-6 (N.D.Ala. Nov. 28, 1989). The court found "no vacancies or promotions in the higher positions of Market Manager or Sales Administrator.". Id. at 6.[5]

Based on these findings, the district court concluded:

> Jones' charge may he used as the foundation for claims by other pivotal employees in the Birmingham market that because of their race they were denied promotions to, or were demoted or discharged from, pivotal positions in this

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[5] The district court restricted its examination to those positions within the Metro Market Zone.

> market. In other respects, the claims sought to be presented--whether on behalf of intervenors or class members-- are beyond the scope of Jones' EEOC charge.

Id. at 8.[6] The court excluded three groups based on Jones' EEOC charge: (i) those seeking jobs above Store Manager (because there were no such jobs in the Metro Market during the period), (ii) non-pivotal employees (because Jones was a pivotal employee), (iii) those seeking jobs outside the Birmingham Market (because Jones was not discriminated against with respect

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[6] The court also stated:

> Jones' EEOC charge ... provides a potential basis for class certification and for intervention by non-filing plaintiffs with respect to claims relating to promotions to the position of Store Managers, and the transfers and demotions of Store Managers within the Birmingham market. His charge presumably also provides a similar foundation for other promotions, transfers, and demotions of lower-rated pivotal employees made by Franklin, the Birmingham Market Manager. Jones' charge does not, however, provide a basis for claims of discriminatory selection of persons for jobs above that of Store Manager, such as Market Manager or Store Administrator decisions that are beyond the effective scope of Jones' charge and that would be made on a different level of the defendant by different persons.

Id. at 6.

to these jobs). This left only the claims of pivotal employees in Birmingham who, like Jones, claimed to have suffered racial discrimination in their employment.

Jones argues that the district court drew the class too narrowly by excluding evidence of jobs outside the Birmingham Market. He claims that the evidence before the district court showed that there was a vacancy in the position of Sales Administrator in the Non-Metro Market Zone which was filled by Terry Dahlem in early August of 1986. Firestone does not dispute the fact of this vacancy, but argues that Jones neither sought promotion to this position nor was he eligible for a transfer to a market-level position in another Zone.

[6] Jones does not argue that he applied for the Dahlem vacancy Under the law of this circuit, he need not make such a showing. Firestone uses an informal promotion system in which it does not post openings or take applications for positions. In *Carmichael v. Birmingham Saw Works,* we held that

> when there is no formal notice of the job's availability, the plaintiff may have no means, within his own knowledge, of showing whether the employer considered him or not. Furthermore, when an employer uses such informal methods it has a duty to consider all those who might reasonably be interested, as well as those who have learned of the job opening and expressed an Interest.
>
> Accordingly, a plaintiff makes out a prima facie case that is, he creates a presumption of discrimination and

> forces the employer to articulate legitimate reasons for his rejection--as long as he establishes that the company had some reason or duty to consider him for the post. The employer cannot avoid a Title VII violation by showing that it incorrectly assumed that the plaintiff was uninterested in the job. When the plaintiff had no notice of or opportunity to apply for the job, such a reason for rejection is "legally insufficient and illegitimate."

738 F.2d 1126, 1133-34 (11th Cir 1984) (quoting *Harris v. Birmingham Bd. of Educ.*, 712 F.2d 1377, 1383 (llth Cir.1983)); *see also Cox v. American Cast Iron Pipe* Co., 784 F.2d 1546, 1560 (llth Cir.), *cert. denied*, 479 U.S. 883, 107 S.Ct. 274, 93 L.Ed.2d 250 (1986).

Although Jones need not show that he applied for the Dahlem post, he must show that he was qualified for the position in order to make out a prima facie case of discrimination. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 936, 108 S.Ct. 2777, 2784, 101 L.Ed.2d 827 (1988) ("[A] prima facie case [of discriminatory treatment contrary to Title VII] is ordinarily established by proof that the employer, after having rejected the plaintiff's application for a job or promotion, continued to seek applicants *with qualifications similar to the plaintiffs.*" (emphasis added)) (citing *Texas Dept. of Community Affairs v. Burdine, 450 U.S.* 248, 253-54 & n. 6, 101 S.Ct. 1089, 1094 & n. 6, 67 L.Ed.2d 207 (1981)). Jones cannot meet this requirement, because the evidence at class certification tended to show that Firestone did not make inter-Zone transfers. In effect, one of the qualifications for the Sales Administrator

may have been experience within the Zone. For a similar reason, the district court concluded that Jones was not discriminated against with respect to pivotal jobs outside the Birmingham market:

> According to plaintiffs, Jones' charge should serve as a basis for challenging pivotal promotions outside the Birmingham market but within the Southeast Region. *This contention suffers from the same flaw that affects their effort to attack promotions to Market Manager or Store Administrator -- namely, that Jones did not suffer such discrimination.*

No. CV-88-P-0170-S, slip op. at 6 (N.D. Ala. Nov. 28, 1989) (emphasis added). At the class certification stage, then, the court did not abuse its discretion by finding that Jones had not shown that he was discriminated against with respect *to any* jobs outside the Birmingham market.

[7] We conclude that the district court properly assessed the effective scope of Jones' EEOC charge. First, Jones did not have a Title VII claim with regard to market-level jobs because no market-level jobs were available in the Metro-Market Zone. Second, Jones did not *have a* Title *VII* claim for promotions outside the Birmingham Market because Firestone had a policy against such transfers. Finally, Ben Jones had no claim that he had not been promoted to a non-pivotal position. Based on his EEOC charge, Jones only had standing to pursue claims regarding promotions, transfers, and demotions relating to Store Manager positions within the Birmingham Market.

[8] Having limited the scope of Jones' EEOC charge, the district court did not abuse its discretion in declining to certify a class. "[A] Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23 (a) have been satisfied." *General Tel. Co. v. Falcon, 457 U.S. 147, 161,* 102 S.Ct. *2364, 2372, 72 L.Ed.2d 740 (1982); see also Griffin, 823 F.2d at 1482; Walker v. Jim Dandy Co.,* 747 F.2d 1360, 1360 1363 (11th Cir. 1984).

Rule 23(a) lists four prerequisites for a class action: numerosity, commonality, typicality and adequate representation.[7] Because the district court found the class as defined to consist of Jones, the Intervenors, one putative intervenor and "only seven other blacks who have been employed as pivotal employees in the Birmingham market and hence might be members of the class," No. CV 88-P-0170-S, slip op. at 8 (N.D. Ala. Nov. 28, 1989), it properly found that the putative class failed to meet the Rule 23 numerosity

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[7] Rule 23(a) provides as follows:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if *(i)* the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

requirement. See Cox, 784 F.2d at 1553 (noting that less than twenty-one is generally inadequate to meet the numerosity requirement). The district court did not abuse its discretion in refusing to certify a Title VII class.

B.

[9] Jones also asserted his promotion claims under section 1981. While this case was pending in the district court, the Supreme Court suggested that typical promotion claims would not be cognizable under section 1981: "[Section 1981] covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process." *Patterson v. McLean Credit* Union, 491 U.S. 164, 179, 109 S.Ct. 2363, 2374, 105 L.Ed.2d 132 (1989). Although this holding has been overruled by Civil Rights Act of 1991,[8]

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[8] That Act amended 42 U.S.C. § 1981 by defining the phrase "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enforcement of all benefits, privileges, terms and conditions of the contractual relationship." Civil Rights Act of 1991, Pub.L. No. 102-166, 101, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981).

Other circuits have considered whether the Civil Rights Act of 1991 applies retroactively to a case pending in the courts when it was enacted. See Luddington *v. Indian Bell Tel. Co.*, 966 F.2d 225, 229-30 (7th Cir. 1992) (holding that Act is applicable only to conduct occurring after effective dates or Act); *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929, 938, 940 (7th

appellants do not argue that this case should be decided under a retroactive application of that statute.[9] They instead claim that *Patterson*, properly interpreted, does not exclude promotion claims of the sort Jones makes.

The *Patterson Court considered* the racial harassment, promotion, and discharge claims of a black teller and file

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Cir.1992) (declining to apply Act retrospectively on appeal or remand); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1371 (8th Cir. 1992) (concluding that the Act did not retroactively preserve a § 1981 promotion claim otherwise precluded under the Supreme Court's rule in *Patterson); Vogel v. City of Cincinnati*, 959 F.2d 594, 597-98 (6th Cir.1992) (holding that the Act did not apply retroactively).

The district courts in this circuit which have ruled on the retroactivity issue are divided. *Compare Maddox v. Norwood Clinic, Inc.*, 783 F.Supp. 582, 586 (N.D.Ala. 1992) (concluding that Act is not retroactive); *Doe v. Board of Co. Comm'rs*, 783 F.Supp. 1379, 1382-85 (S.D. Fla. 1992) applying *Bradley* test to conclude that Act does not apply retroactively); *with Watkins v. Bessemer State Technical College, 782 F.Supp.* 531, 585 (N.D.Ala. 1992) (finding that the Act simply *restored the law to its state before Patterson); King v. Shelby Medical Crt., Inc., 779* F.Supp. 157 (N.D.Ala.1991) (same).

[9] We have recently held that the Act is not to be applied retroactively. *See, Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370, 1373 (11th Cir. 1992) (*per curiam*).

coordinator in a North Carolina credit union. The plaintiff asserted her claim under section 1981. The Court found that the plaintiff's harassment claims were not cognizable under section 1981:

> By its plain terms, the relevant provision in § 1981 protects two rights: "the same right ... to make ... contracts" and "the same right ... to ... enforce contracts." The first of these protection extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment. The statute prohibits, when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms. But the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions. Such post formation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the connections of continuing employment, matters more naturally governed by state contract law and Title VII.

491 U.S. at 176-177, 109 S.Ct. at 2372-73. The Court went on to suggest that most promotion claims would not be cognizable under section 1981:

> the question whether a promotion claim is actionable under 1981 depends upon whether the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer. If so, then the employer's refusal to enter the new contract is actionable under section 1981. In making this determination, a lower court should give a fair and natural reading to the statutory phrase "the same right ... to make ... contracts," and should not strain in an undue manner the language of § 1981. Only where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer is such a claim actionable under § *1981. Cf. Hishon v. King & Spaulding, 467 U.S. 69, 104* S.Ct. 2229, 81 L.Ed.2d 59 (1984) (refusal of law firm to accept associate into partnership) (Title VII).

Id. 491 U.S. at 185-186, 109 S.Ct. at 2377; *see also Wall v. Trust Co. of Ga.*, 946 F.2d 805, 808-09 (llth Cir. 1991) (adopting *Patterson* test); *Weaver v. Casa Gallardo, Inc.* 922 F.2d 1515, 1519-20 (llth Cir.1991) (remanding promotion claims for reconsideration in light of *Patterson).*

Under the test suggested by the Supreme Court in *Patterson,* then, the district court could have found that the promotions which Jones was denied did not rise "to the level or an opportunity for a new and distinct relation between the employee and the employer." The court concluded that Jones did not have a cognizable claim under section 1981 as interpreted by *Patterson* and was not able to serve as a class representative for the putative section 1981 class. This was not an abuse of

discretion, and so we affirm the district court's refusal to certify a section 1981 class.

III

A district court should grant summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and ... the moving party is entitled to judgment as a matter of law." Fed.R.CivP 56c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The trial judge is not to weigh the evidence at summary judgment to determine the truth of the matter but to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc., 477 U.S.* 242, 249, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986). Further, "[t]he evidence of the nonmovnts is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255, 106 S.Ct. at 2513 (citing *Adickes v. S.H. Kress, Co.*, 398 U.S. 144, 158-59, 90 S.Ct. 1598, 1608-09, 26 L.Ed.2d 142 (1970)). "Summary judgment should only be entered when the moving party has sustained its burden of showing the absence of a genuine issue as to any material fact when all evidence is viewed in the light most favorable to the non-moving party." *Morrison v. Washington County, Ala.*, 700 F.2d 678, 682 (11th Cir.) (citing *Adickes, 398 U.S.* at 157, 90 S.Ct. Lt 1608, *cert denied*, 464 U.S. 864, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983).

[10] Our review of a district court's grant of summary judgment is *de novo*. *See Morrison*, 700 E.2d at 682. "When we examine a decision granting or denying summary judgment, we apply the same legal standards that control the district court's determination." *Mercantile Bank & Trust Co. v. Fidelity Deposit Co.*, 750 F.2d 838, 841 (11th Cir.1985). Under this standard of review, which is different from the standard at class certification, we cannot affirm the district court's summary judgments on the promotion claims.

A.

The district court granted summary judgment for Firestone on three of Ben Jones' claims: constructive discharge, promotion, and discriminatory assignment. Jones does not appeal the summary judgment on the constructive discharge claim.

1.

[11] Jones alleged that he was a victim of discrimination in the refusal of Firestone to promote him to a position above Store Manager. At summary judgment, the district court found no evidence of any specific opening available to Jones during the 180 day period before the filing of the EEOC charge. The district court further concluded that the claims could not be raised under the longer limitation period of section 1981 because of the rule enunciated in *Patterson*.

Jones claims that the record on summary judgment showed that there were vacancies available to him during the 180 days before he filed his EEOC charge. In the alternative, Jones claim that his promotion claims are cognizable under section 1981 despite *Patterson*. We reverse the grant of summary judgment on these promotion claims since there were genuine issues of material fact as to the existence and nature vacancies to which Jones might have been promoted.

Four elements must be shown to make out a prima facie case of disparate treatment under either Title VII or section 1981:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority, (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973); *see also Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253-54, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981); *cf. Patterson*, 491 U.S. at 186-87, 109 S.Ct. at 2378.

The district court granted summary judgment for Firestone because it found that Jones produced no evidence of any vacancy

fact, and summary judgment was inappropriate on Jones' Title VII promotion claim.[10]

Jones' promotion claim may also be cognizable under section 1981. Again, the district court does not appear to have considered whether the Dahlem vacancy offered "an opportunity for a new and distinct relation between the employee and the employer." *Patterson,* 491 U.S. at 185-86, 109 S.Ct. at 2377. The record at summary judgment, construed in the light most favorable to the nonmovant, suggests that this is a genuine issue of material fact.

Since we find that summary judgment was inappropriate on the promotion claims of Ben Jones, we reverse and remand for further proceedings.

2.

[12] Jones also alleged that he was the victim of discriminatory assignment in that Firestone followed a practice of assigning black Store Managers to stores that had a

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[10] The court, in the exercise of its broad discretion regarding certification of a class, was entitled to weigh; the conflicting evidence regarding inter-Zone transfers and conclude that Jones was not eligible for the Dahlem vacancy. Nevertheless, the standard is very different for our review of summary judgment. The plaintiff's evidence, and the justifiable of inferences from it, present a genuine issue of material fact which precluded summary judgment.

record at summary judgment, construed in the light most favorable to the nonmovant, suggests that this is a genuine issue of material fact.

Since we find that summary judgment was inappropriate on the promotion claims of Ben Jones, we reverse and remand for further proceedings.

2.

[12] Jones also alleged that he was the victim of discriminatory assignment in that Firestone followed a practice of assigning black Store Managers to stores that had a predominantly black clientele. Such assignments effectively limited black managers to stores with lower income potentials. Again, the district court granted summary judgment, concluding that the record revealed no vacancies during the 180 day period before the EEOC charge was filed. The district court again found that *Patterson* precluded pursuit of this claim under section 1981.

Jones claims that the record on summary judgment showed that there were vacancies. He points to the court's certification opinion: "Jones failed to be selected by [the Market Manager] for a transfer to any of the several Store Manager positions that were filled during the period and which may have provided an opportunity for increased earnings, albeit at the same level." No. CV 88-P-0170-S, slip op. at 5-6 (N.D. Ala. Nov. 28, 1989) In the context of the opinion, this excerpt does not suggest that the district court found such vacancies, but merely that it assumed vacancies for the sake of argument. Even assuming such vacancies, the court rejected certification of the discriminatory

We affirm the summary judgment order in favor of Firestone on the store assignment claims.

B.

Because we hold that it was improper to grant summary judgment for Firestone on Jones' promotion claims, we also remand the promotion claims *of the Intervenors* for further proceedings pursuant to the single filing rule. *See Griffin,* 823 F.2d at 1492 ("As long as at least one named plaintiff; timely filed an EEOC charge, the precondition to a Title VII action is met for all other named plaintiffs and class members.").

Conversely, because we find that Jones did not have any other valid claims under Title VII or section 1981, we affirm the summary judgments as to the Intervenors other claims.

IV.

[13] Jones proceeded to trial on his last two claims; demotion and retaliation. Factual conclusions reached by the district court are subject to a "clearly erroneous" standard of review on appeal. Fed. R. Civ. P. 52 (a); *see Anderson v. Bessemer City,* 470 U.S. 564, 573-76, 105 S.Ct. 1504, 1511-12, 84 L.Ed.2d 518 (1985).

[14] The elements of any claim under Title VII, which will necessarily vary in "differing fact situations" are (i), that the plaintiff is a member of a protected class, that the plaintiff was

IV.

[13] Jones proceeded to trial on his last two claims; demotion and retaliation. Factual conclusions reached by the district court are subject to a "clearly erroneous" standard of review on appeal. Fed. R. Civ. P. 52 (a); *see Anderson v. Bessemer City*, 470 U.S. 564, 573-76, 105 S.Ct. 1504, 1511-12, 84 L.Ed.2d 518 (1985).

[14] The elements of any claim under Title VII, which will necessarily vary in "differing fact situations" are (i), that the plaintiff is a member of a protected class, that the plaintiff was qualified for the position in question,(iii) that the plaintiff suffered an adverse employment decision, and (iv) that this adverse decision was causally related to the status *of* the plaintiff as a member of the protected class. *McDonnell Douglas*, 411 U.S. at 802 n.13, *93* S.Ct. at 1824 & n. 13.

The district court's statement of the elements of Jones' demotion and retaliation claims were substantially correct. On the demotion claims the court stated from the bench "Mr. Jones has got to prove that he is a member of a protected group .... He's got to prove that an adverse employment action was taken .... He has got to prove that he was treated more harshly than persons not in the protected group under similar circumstances." The Court found that Jones failed to demonstrate that "he was treated more harshly than persons not in the protected group under similar circumstances". This finding was not clearly erroneous.

priately in granting summary judgment on the non-promotion claims of Jones and the Intervenors. The trial verdicts in favor of Firestone were not erroneous. We affirm these findings.

Summary judgment was inappropriate on Jones' promotion claims and on those of the Intervenors. We reverse these rulings and remand for further proceedings.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BEN JONES, et al.,	)	
	)	
Plaintiffs;	)	
	)	
- vs. -	)	CASE NO. CV 88-P-0170-S
	)	
	)	
FIRESTONE TIRE AND RUBBER COMPANY,	)	
	)	
	)	
Defendant.	)	

OPINION

Pending before the court is the plaintiffs' request that this case be certified as a class action on behalf of all blacks employed by Firestone within its Southeast Region since October 12, 1984, with respect to claims they have been, or will be, denied promotional opportunities to "pivotal" positions and above

in violation of Title VII or 42 U.S.C. § 1981.[1] On January 17, 1989, an evidentiary hearing under FED. R. Civ. P. 23 was conducted, and the parties subsequently filed additional briefs based on that evidence. The ruling has been regrettably delayed, in part because of continuing developments in the law relating to claims of "adverse impact" and the ambit of 42 U.S.C. § 1981.

I. Ben Jones' Complaint.

The action was filed on February 1, 1988, by Ben Jones. Jones, a black; man, had been employed by Firestone in 1968 at one of its stores in the Birmingham market as a salesperson. He had progressed through a series of jobs at different stores in the Birmingham market, with his last promotion being in June 1984 to the position of Store Manager at the downtown Birmingham store. On August 20, 1986, he quit after being told he would have to take a demotion to Assistant Store Manager or be fired. On October 12, 1986, he filed an EEOC charge in which he asserted that his termination from his position of Store Manager was based on his race and in retaliation for an earlier EEOC charge. In this 1986 EEOC charge he also complained that Firestone had a practice of assigning managers to stores based on the racial composition of the stores' clientele and included a general assertion that Firestone "discriminates against black employees in job assignments, promotions, discipline, discharges, and other terms and conditions of employment." Jones' complaint broadly makes these same charges on behalf of himself and a class of other blacks similarly situated, but his

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[1] Also pending are motions to intervene by Marvin Grant, Willie Mallory, and Sherman Jones, and Firestone's motion for the court to reconsider its order allowing intervention by Ned Vandiver.

request for class certification is limited to claims of racial discrimination in making promotions.

II. Firestone's Organizational Structure.

Firestone's Birmingham market consists of 17 stores and is under the direction of a Market Manager. Each store has a Store Manager, one or more other "pivotal" employees (Assistant Store Manager, Service Manager, and retail Salespersons), and several nonpivotal, or shop, employees (Technicians, Installers, and General Service Persons). Since his promotion to Market Manager in March 1985, Joseph Franklin has been the person who has made the decisions concerning promotions of persons to Store Manager in the Birmingham market, as well as transfers, demotions, and terminations of those Store Managers.

The Birmingham market is one of five "metro markets" in the eight-state area that comprises Firestone's Southeast Region. The others are Nashville, Memphis, Charlotte, and Jacksonville. These five relatively autonomous units, covering a total of 85 stores, are consolidated for administrative purposes under the supervision of the Manager of Metro Markets, David Stuart. Stuart makes the decisions concerning promotions of persons to positions of local Market Manager and Sales Administrator[2] in the metro markets. Prior to October 1986, when Stuart's position was created, decisions concerning those promotions were apparently made by the Regional Director.

In addition to the metro markets, Firestone's Southeast Region includes "non-metro markets" and "major metro

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[2] Sales Administrators support local Market Managers by providing accounting services respecting sales operations within their markets.

In addition to the metro markets, Firestone's Southeast Region includes "non-metro markets" and "major metro markets." The organizational structure of these units is analogous to that for Birmingham and the other metro markets.

There are 125 non-metro stores, each with a Store Manager. These stores are assigned to one of eight non-metro markets. Each non-metro market has a local Market Manager, who in turn is supervised by the Manager of Non-Metro Markets.

Firestone has three "major metro markets" in the Southeast Region: Atlanta (30 stores), Miami (38 stores), and Tampa-Orlando (40 stores). Store Managers of the stores in these markets report to a Store Supervisor, whose duties are essentially the same as those of local Market Managers. The two Store Supervisors in each major metro report to the Manager of that Major Metro Market.

The Manager of the Metro Markets, the Manager of the Non-Metro the three Managers of Major Metro Markets report to the Regional Director, David Luck. Luck has been the Southeast Regional Director since November 1987, when he succeeded Terry Sprott.

III. Interventions.

Starting in late June 1988, a series of motions to intervene were filed in this case by other blacks who were employed, or had been employed, at Firestone stores in the Birmingham market but who had not themselves filed charges with the EEOC. The initial motions were allowed by the court, without, however, ruling on whether such intervenors could take advantage of Jones' EEOC charges.

On August 25, 1988, the court permitted the following interventions: John Issac, who had held the position of Store

Manager at the Ensley store;[3] Harvey Echols, who had been rehired as a Technician at the Village East store after earlier having held a position as Service Manager or Assistant Store Manager at the Ensley store; and Henry Washington, who had been terminated after two months' employment as a Retail Salesperson at the East Lake store.[4] On January 5, 1989, the court permitted intervention by Jim Thornton, who had been discharged in September 1987 from a position as Store Manager of the Green Springs store. Each of these intervenors claimed that he had been denied promotions to positions as Store Manager (or Store Manager at larger stores), as Market Manager, or Sales Administrator. A similar claim is made by Sherman Jones, whose motion to intervene filed on January 6, 1989, has not been ruled upon: he was employed as a Retail Salesperson until September 1987 in two Birmingham stores.[5]

Intervention has also been sought by three blacks who have been employed outside the Birmingham market but within Firestone's Southeast Region: Ned Vandiver, who holds the position of Store Manager in the Atlanta Major-Metro Market after being demoted from a higher position; Willie Mallory, who resigned from a position as Store Manager in that same market; and Marvin Grant, who was discharged from a position

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[3] A factual dispute exists as to whether Issac was fired or voluntarily quit.

[4] Washington asserts that he also served as an Assistant Store Manager.

[5] Jones asserts that he was also a "Protege" and Assistant Store Manager.

as Store Manager in the Memphis market. The motions to intervene by Mallory and Grant have not yet been ruled upon and are opposed by Firestone. Firestone also requests that the court vacate an earlier order permitting Vandiver's intervention. None of these individuals had personally received any right-to-sue letters from the EEOC.

IV. Effective Scope of Ben Jones' EEOC Charge.

As indicated, the charge filed by Ben Jones with the EEOC asserts broadly that Firestone "discriminates against black employees in job assignments, promotions, discipline, discharges, and other terms and conditions of employments." The extent, however, to which this charge provides a basis for Jones to represent a class under Fed. R. Civ. P. 23 or for others to intervene to assert Title VII claims under the "single-filing rule" depends upon the particular claims which Jones may individually pursue under his charge. *See generally, Griffin v. Dugger*, 823 F.2d 1476 (11th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1729 (1988). In *Griffin* the Court of Appeals held that claims of a discriminatory testing procedure could not be presented either as class claims or as claims by a non-filing intervenor where the two plaintiffs who had filed EEOC charges--charging a wide array of discriminatory practices--had not personally been deprived of promotions because of the tests. The importance of Jones' EEOC charges has become especially critical since *Patterson v. McLean Credit Union*, U.S. , 109 S.Ct. 2363 (1989), holding in essence that 42 U.S.C. § 1981

may not be used to pursue typical promotional claims such as presented by Jones, the intervenors, and the putative class.[6]

Jones filed his EEOC charge on October 12, 1986. His viable complaints under Title VII are limited to matters that occurred between April 15, 1986--180 days before filing the charge--and August 20, 1986--the date he quit.[7] What happened during that period about which he can complain? First, his demotion by Franklin on August 20th from the position of Store Manager; second, his failure to be selected by Franklin for a transfer to any of the several Store Manager positions that were filled during that period and which may have provided an opportunity for increased earnings, albeit at the same job position level. However, no vacancies or promotions in the higher positions of Market Manager or Sales Administrator occurred during that period.[8]

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[6] Plaintiffs' use of "adverse impact" as a basis for class certification would, moreover, presumably be unavailable were the case evaluated under § 1981.

[7] Jones argues that promotions after August 20, 1986, should be considered on the basis he was "constructively discharged" when he quit after being advised of his pending demotion to Assistant Store Manager. The doctrine of "constructive discharge" is, however, clearly inapplicable in these circumstances.

[8] Use of the two-year limitations period afforded by 42 U.S.C. 1981, if that were applicable, would not change the situation. The action was filed on February 1, 1988. No vacancies or promotions to the position of Market Manager or Sales Administrator occurred during the period from February 1, 1986-two years before the date of filling-to August 20, 1986.

Jones' EEOC charge, therefore, provides a potential basis for class certification and for intervention by non-filing plaintiffs with respect to claims relating to promotions to the position of Store Managers, and the transfers and demotions of Store Managers within the Birmingham market. His charge presumably also provides a similar foundation for other promotions, transfers, and demotions of lower-rated pivotal employees made by Franklin, the Birmingham Market Manager.[9] Jones' charge does not, however, provide a basis for claims of discriminatory selection of persons for jobs above that of Store Manager, such as Market Manager or Store Administrator--decisions that are beyond the effective scope of Jones' charge and that would be made on a different level of the defendant by different persons. *See Griffin v. Dugger*, 823 F.2d 1476 (11th Cir. 1987); *Hill v. Metropolitan Atlanta Rapid Transit Auth.*, 841 F.2d 1533 (11th Cir. 1988), *modified on other grounds*, 848 F.2d 1522 (1988).

According to plaintiffs, Jones' charge should serve as a basis for challenging pivotal promotions outside the Birmingham market but within the Southeast Region. This contention suffers from the same flaw that affects their effort to attack promotions to Market Manager or Store Administrator--namely, that Jones

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during the period from February 1, 1986-two years before the date of filling-to August 20, 1986.

[9] Although Store Managers are involved in selection of lower-rated pivotal employees, Franklin has acknowledged that these decisions are made under his direction.

simply presented under a theory of "adverse impact" by showing that Firestone's supervisors did not utilize wholly objective standards in selecting persons for promotion.[10] Their position is succinctly stated in their Reply Memorandum in Support of Class Certification (p.6):

> "The class-wide claims involve one issue: whether the defendant's multi-component subjective promotional procedure violates Title VII of the Civil Rights Act of 1964 by having disparate impact on black employees and not being justified by business necessity. From the outset it must be understood that the use of statistical evidence to prove impact will be minimal. Furthermore, disparate impact analysis does not look at the various reasons why the multi-component process affects black employees; rather it is only concerned with the bottom line, i.e., why are blacks not holding higher level positions at Firestone. The reasons why a black is not promoted does not effect [sic] the defendant's defenses in this case".

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[10] Firestone asserts that its supervisors have been directed to use "measurable, objective criteria" in making promotions; e.g., in promoting Store Managers the Birmingham Market Manager has considered attainment of sales and profit objectives, employee turnover, store appearance, customer complaints, and ability to direct the workforce, as reflected in formal, annual evaluations. Nevertheless, such criteria are themselves undefined, which results clearly in a substantial degree of subjectivity. *Cf. Watson v. Fort Worth Bank and Trust*, ___ U.S. ___, 108 S.Ct. 2777, 2786 (1988) ("[h]owever one might distinguish 'subjective' from 'objective' criteria, it is apparent that selection systems that combine both types would generally have to be considered subjective in nature".).

are blacks not holding higher level positions at Firestone. The reasons why a black is not promoted does not effect [sic] the defendant's defenses in this case".

This approach, however, has been explicitly rejected by the Supreme Court in *Wards Cove Packing v. Atonio,* ___ U.S. ___, 109 S.Ct. 2115 (1989), a decision issued subsequent to plaintiffs' brief and holding that disparate impact may not be established merely by a showing of racial imbalance "at the bottom line". The Court held that even in a class action plaintiffs must demonstrate that some identified specific practice has created this impact,[11] and that, even in such cases, further exploration may be necessary with respect to whether the company's business justification defense is a pretext for discrimination. See also, *Hill v. Seaboard Coast Line R. Co.*, 885 F.2d 804 (11th Cir. 1989).

Plaintiffs also content that Jones' charge should be viewed as permitting claims by non-pivotal employees that they were not selected to fill pivotal vacancies in the Birmingham market. The evidence, however, is clear that any such transfers would he aberrations from the normal promotional progression and that Jones, having been initially employed in 1968 into a pivotal position, did not personally have any such claim.

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[11] Note that, although the general policy here under attack -- i.e., Firestone's directive to its local Market Managers to select the best qualified person using "measurable, objective criteria" -- is the same for the entire Southeast Region, the implementation of that policy, including the choice of the criteria to be used, will vary among the nineteen local Market Managers and Supervisors.

because of their race they were denied promotions to,[12] or were demoted or discharged from, pivotal positions in this market. In other respects, the claims sought to be presented--whether on behalf of intervenors or class members--are beyond the effective scope of Jones' EEOC Charge. The intervention of Issac, Echols, Washington, and Thornton, as previously allowed by the court, are therefore proper, as is the requested intervention of Sherman Jones. The proposed interventions by Grant and Mallory should, however, be denied; and the order that previously allowed intervention by Vandiver should be vacated.

V. Requirements of Rule 23.

One of the prerequisites for class certification is that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). The evidence presented indicates that (in addition to the plaintiff, the intervenors, and the proposed intervenor) there are, at a maximum[13] only seven other blacks who have been employed as pivotal employees in the Birmingham market and hence might be members of the class. Rule 23(a)(1) is clearly not satisfied, and a class is therefore not to be certified. *See Cox v. American Cast Iron Pipe*

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[12] For this purpose, a promotional opportunity would include the possibility of a transfer in the same position from one store to another with greater potential.

[13] This count is based upon those employed as pivotals since October, 1984. It may, of course, be that the employment of some of these terminated before April 15, 1986, or that some would not have claims of a denial of promotions after that date.

class. Rule 23(a)(1) is clearly not satisfied, and a class is therefore not to be certified. *See* Cox v. American Cast Iron Pipe Co., 784 F.2d 1546, 1553 (11th Cir.), *cert. denied* 479 U.S. 883 (1986) (less than twenty-one generally inadequate for class).

VI. Summary.

Based on the findings and conclusions recited, the court will by separate order (a) deny class certification, (b) grant the motion of Sherman Jones to intervene, (c) deny the motions of Marvin Grant and Willie Mallory to intervene, and (d) vacate its earlier order that had allowed intervention by Ned Vandiver.

This the 28th day of November, 1989.

/s/
Sam C. Pointer, Jr.
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7499

District Court No. CV-88-N-00170-S

Ben JONES,

Plaintiff,

John Issac; Harvey Echols;
Jim Thornton; Sherman Jones;
Henry Washington,

Plaintiffs-Intervenors,
Appellants,

versus

FIRESTONE TIRE AND RUBBER COMPANY, INC.,

Defendant-Appellee.

No. 90-7755

District Court No. CV-88-N-170-S

Ben JONES,

Plaintiff-Appellant,

John Issac; Harvey Echols;
Jim Thornton; Sherman Jones;
Henry Washington,

Plaintiffs-Intervenors,

versus

FIRESTONE TIRE AND RUBBER COMPANY, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Alabama

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ON PETITION FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion October 27, 1992, 11th Cir., 19___, ___ F.2d ___)

Before: TJOFLAT, Chief Judge, BIRCH, Circuit Judge, and HILL, Senior Circuit Judge

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure: Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearings are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular

active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure: Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ GERALD BARD TJOFLAT
United States Circuit Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7499

District Court No. CV-88-N-00170-S

Ben JONES,

Plaintiff,

John Issac; Harvey Echols;
Jim Thornton; Sherman Jones;
Henry Washington,

Plaintiffs-Intervenors,
Appellants,

versus

FIRESTONE TIRE AND RUBBER COMPANY, INC.,

Defendant-Appellee.

No. 90-7755

District Court No. CV-88-N-170-S

Ben JONES,

Plaintiff-Appellant,

John Issac; Harvey Echols;
Jim Thornton; Sherman Jones;
Henry Washington,

Plaintiffs-Intervenors,

versus

FIRESTONE TIRE AND RUBBER COMPANY, INC.,

Defendant-Appellee.

O R D E R:

( ) The motion of Appellants. for ( ) stay ( ) recall and stay issuance of the mandate pending petition for writ of certiorari is DENIED.

(XX) The motion of Appellants. for (XXX) stay ( ) recall and stay of the mandate pending petition for writ of certiorari is GRANTED to and including March 26, 1993 , the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period mentioned above there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shallbe filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____ under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

/s/ GERALD BARD TJOFLAT
CHIEF UNITED STATES CIRCUIT JUDGE